Supreme Court, U. S.
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In the Supreme Court of the United States

October Term, 1979

No. 79-1302

DAVID S. KENNEDY, Trustee in bankruptcy of the estates of JIMMY ODELL CLIMER and SUZETTE CLIMER, aka MRS. JIMMY CLIMER, Bankrupts,
Petitioner,

vs.

HANCOCK INVESTMENT COMPANY, INC. and HARDEMAN COUNTY SAVINGS BANK,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

BRIEF IN OPPOSITION

JAMES S. SHIELDS
One Commerce Square, Suite 1150
Memphis, Tennessee 38103
(901) 525-1419
Attorney for Respondents

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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QUESTION PRESENTED

Do the Tennessee recording statutes and Sec. 70c of the Bankruptcy Act, 11 U.S.C.A., Sec. 10 (c) invalidate an unrecorded title bond and/or a real estate sales contract wherein the contract provides that the seller remains the record title owner until the consideration is paid in full by the purchasers.

STATEMENT OF FACTS

On or about August 13, 1975, Hancock Investment Company, Inc., the record title owner of the real property in question, entered into a written contract with the Bankrupts, Jimmy O. Climer and wife, Suzette J. Climer. (Petioner's Appendix A18). The contract provided that for a stated sum, payable in installments, Hancock would upon receipt of the entire purchase price, execute a deed conveying said real property to Jimmy O. Climer and wife, Suzette J. Climer, but until the full purchase price was paid, as per the provisions of the contract, Hancock would remain the record legal title holder. At the same time a monthly installment amortized note with prepayment privileges was executed by the Climers in favor of Hancock as provided in the contract. This contract was not recorded by either party.

After the execution of the contract, the Climers made monthly payments to Hancock as provided in the contract, borrowed money from the Hardeman County Savings Bank of Bolivar, Tennessee. The Mortgage in favor of the Hardeman County Savings Bank and executed by the Climers, expressly stated that the contract of August 13, 1975, between Hancock and the Climers was prior and paramount to the lien hereof. (Respondents' A-1). The Climers used the money borrowed from the Bank to build a house on the real property in question.

Thereafter, the Climers filed voluntary petitions in bankruptcy on February 4, 1977.

ARGUMENT

The respondent, Hancock Investment Company, Inc., respectfully moves this Honorable Court deny the Petition for Certiorari for the following reasons:

1. Tennessee Statutory Law governing transfers of real estate. Since the early 1830's there has been in existence the following Tennessee Statutes covering transactions conveying real estate, said statutes being:

> "Tennessee Code Annotated Section 64-2401 - Writings eligible for Registration - The following writings *may* be registered:
>
> (1) All agreements and bonds for the conveyance of real or personal property.
>
> "Tennessee Code Annotated Section 64-2601 - Effect of instruments with or without registration - All of the instruments mentioned in Tennessee Code Annotated - Section 64-2401 - shall have the effect between the parties to the same and their heirs and representatives without registration, but as to other persons not having actual notice of them, only from noting thereof for registration on the books of the Register, *unless otherwise expressly provided.*
>
> "Tennessee Code Annotated Section 64-2603 - Unregistered instruments are void as to creditors and bona fide purchasers.---Any of said instruments not so proved or acknowledged and registered or noted for registration, shall be null and void to existing or subsequent creditors of, or bona fide purchasers from the *makers* without notice."

2. Tennessee court decisions construing such contracts and the above statutes.

For more than one hundred (100) years the courts of Tennessee have in construing the above statutes, held that there are three methods for the seller to secure the payment of the purchase price due in a real estate sale:

(1) by recorded deed and recorded mortgage;

(2) by contract on the face of the deed;

(3) by retaining the legal title under an unregistered title bond or installment contract until payment in full of the purchase price is received by the title holder-seller, at which time the seller will convey to the purchaser title to the property. [Note the validity and inforceability of such unregistered title bond and/or installment contract was acknowledged by the bank in its mortgage from the Climers. (A-1)].

Our courts have consistently held that an unregistered title bond and/or installment contract is enforceable against all persons except those set out in Tennessee Code Annotated 64-2603, supra, and the vendor has a superior lien against creditors of the vendee; holding that in such cases the only remedy vendee's creditors have is by bill in Chancery to subject the vendee's interest in the property, making the vendor a party, he being entitled to the balance due on the purchase price before any creditor is paid.

Bryant v. Bank, 107 Tenn. 566

Hines v. Perkins, 49 Tenn. 395

Leech v. Hillsman, 76 Tenn. 747

Gillespie v. Bradford, 15 Tenn. 166

3. What is the effect of 70c, 11 U.S.C.A., Sec. 110 (c) on the status of the real property in question?

The Federal Courts hold that the Trustee in Bankruptcy has no greater interest, ownership or title to property in the hands or control of the bankrupt than the bankrupt has on the *day of the bankruptcy.*

Trustees in Bankruptcy acquire title to assets of Bankrupt by authorization of law and are not an innocent purchaser for value, but take title to the Bankrupt's property subject to all the liens, claims and equities thereon.

In Re: *Richards,* 55 F.2d 281

In Re: *James,* 337 Fed. Supp. 620

What interest did the Climers have in the real property in question?

They had the right to pay the purchase price agreed upon between them and Hancock and upon making such payment they were entitled to a warranty deed from Hancock according to the terms of the contract. (Petitioner's A18).

Upon bankruptcy, the Trustee and/or the creditors had the right to sell the property, first paying Hancock the balance of the purchase price due Hancock and dividing what money was left under the direction of the Bankruptcy Court.

Leech v. Hillsman, 76 Tenn. 747

Gillespie v. Bradford, 15 Tenn. 166

4. This is a Tennessee contract dealing with Tennessee residents concerning Tennessee real property and, therefore, the laws of Tennessee should govern, and such is the rule according to the Federal Court decisions.

In Re: *Hertzberg Trustees v. Associates Discount Corp.,* (6th Circuit) 272 F.2d 6

"The opinion of the district judge, reported In re: Freeman, CD ED Michigan, 168 Fed. Supp. 25, carefully analyzes and discusses these contentions. It was his conclusion that the powers of the Trustee as a hypothetical creditor are to be determined by reference to state law, that in the enactment of Sec. 70, subsection C, 11 U.S.C.A., Sec. 110 (c) Congress did not intend any limitation on the extent to which state law might curtail these powers, that Act 153 (Michigan) did not strip the Trustee of any powers since the Trustee had never acquired the power to invalidate the lien. This ruling is in accordance with the settled law that the effect to be given in bankruptcy to any unrecorded chattle mortgage is determined by the recording law of the state. In re: Glassman, (6 Circuit) 262 F.2d 857, and that when the bankruptcy court takes over the bankrupt's property such property is taken subject to existing rights established by the local law."

In Re: Hertzberg Trustees v. Associates Discount Corp., (6th Circuit) 272 F.2d 6

The above opinion was also adopted by the Courts in the cases of *In Re: Easy Living,* 407 F.2d 142 and *In Re: Clemens,* 472 F.2d 939.

In Tennessee ownership of real property is determined by a study of the records in the Register's Office of the county in which the property is located. Any person having an interest in the land in question would have been put on notice that Hancock held the record title of the property, although the Climers were living on the property. Therefore, any prudent person would have contacted Hancock about the ownership of the property rather than the Climers.

5. Effect and/or application of the Commercial Code of Tennessee as to this transaction:

The Commercial Code of Tennessee deals solely with personal property and has no application in the transfer and ownership of real property.

The Trustee cites T.C.A., Sec. 47-9-301, but this section as well as the rest of the Commercial Code, as adopted in Tennessee, deals with personal property and has no application to the problem at hand as the question here is the validity of an unrecorded title bond and/or installment contract for the purchase of real estate, the title to which is held by the seller and will be deeded to the purchaser upon payment of the full consideration and not before. So that pending such payment in full, the title remains in the name of the seller, which title has been duly and properly recorded so that anyone interested in the ownership of said property could ascertain the ownership by search of the title records in the Register's Office of the county in which said property lies.

CONCLUSION

It is respectfully submitted by Hancock Investment Company, Inc. that based upon the Federal Court decisions, the statutes of the State of Tennessee, the Tennessee Court decisions construing said statutes and contracts like the one between Hancock and the Climers, and the Bankruptcy Act, that Hancock is a secured creditor and as such, is entitled to have the contract complied with before the Trustee, the Bankrupts or anyone else has any right to take any action against the real property described in the contract without first complying with its terms and conditions.

Hancock Investment Company, Inc. respectfully moves the Court deny the Petition for Certiorari filed herein by the Trustee in Bankruptcy.

Respectfully submitted,

JAMES S. SHIELDS
One Commerce Square, Suite 1150
Memphis, Tennessee 38103
(901) 525-1419
Attorney for Respondents

MID-SOUTH TITLE COMPANY, INC.

This Instrument Prepared by:
Irvin H. Levit, Atty.
100 N. Main Bldg.
Memphis, Tenn.

MST Tract
Reference:

DEED OF TRUST

This Indenture made and entered into this 3rd day of December, 1975
and between

JIMMY O. CLIMER and wife, SUZETTE J. CLIMER

party of the first part, and MALCOLM VINCENT, Trustee,

party of the second part,

WITNESSETH: That for and in consideration of Five Dollars Cash in hand paid by the party of the second part to the party of the first part, and the debt and trusts hereinafter mentioned, said party of the first part has bargained and sold and does hereby bargain, sell, convey and confirm unto the said party of the second part the following described real estate situated and being in 7th Civ. Dist., Fayette Shelby County, Tennessee, to-wit:

Lot 6, BIG BELL Subdivision, Section 2A, as shown on plat of record in Plat Book 4, Page 2, in the Register's Office of Fayette County, Tennessee, to which plat reference is made for a more particular description, containing 3.837 acres.

TO HAVE AND TO HOLD, the aforedescribed real estate, together with all the hereditaments and appurtenances thereunto belonging or in any wise appertaining unto the said party of the second part, his successors and assigns, in fee simple forever, and the said party of the first part does hereby covenant with the said party of the second part, his successors and assigns, that he is lawfully seized in fee of the aforedescribed real estate; that he has a good right to sell and convey the same; that the same is unincumbered, except, by contract dated August 13, 1975, executed by Hancock Investment Company, Inc. and by said Jimmy O. Climer and wife, Suzette J. Climer, which contract is prior and paramount to the lien hereof,

and that the title and quiet possession thereto he will and his heirs and personal representatives shall warrant and forever defend against the lawful claims of all persons.

But this is a Deed of Trust, and is made for the following uses and purposes, and none other; that is to say: the said party of the first part is justly indebted to HARDEMAN COUNTY SAVINGS BANK, Bolivar, Tennessee, or the holder of the notes hereinafter mentioned, in the sum of Thirty-five Thousand and no/100 - - - - ($35,000.00) - - - - - - - - - Dollars, evidenced by one (1) note of even date herewith for said principal sum, due on or before one (1) year from the date hereof, together with interest thereon at the rate of nine (9%) per centum per annum from the date hereof.

A-1

The party of the first part desires to secure and make certain the payment of said indebtedness, and of any and all renewals and extensions thereof. Now, therefore, the party of the first part agrees and binds himself that so long as any part of the indebtedness aforesaid shall remain unpaid, he will pay all taxes and assessments against said property promptly when due, and deposit all tax receipts with the holder of the greater portion of the outstanding indebtedness secured hereby; will insure the buildings on said property for not less than the lesser of (1) the insurable value thereof or (2) the total indebtedness secured by mortgages, deeds of trust or other security instruments encumbering the aforedescribed real estate against loss or damage by fire and the perils against which insurance is afforded by extended coverage endorsement in some insurance company or companies approved by the holder of the greater portion of the outstanding indebtedness secured hereby, cause said policies to contain a standard mortgage clause in favor of the holder of said indebtedness and deposit said policies with the holder of the greater portion of the outstanding indebtedness secured hereby as further security for said debt; will protect the improvements on said property by proper repairs, and maintain them in good repair and condition; will not do anything or suffer or permit anything to be done whereby the lien of this Deed of Trust might or could be impaired; will pay such expenses and fees as may be necessary in the protection of the property and the maintenance and execution of this trust, including, but not being limited to, expenses incurred by the Trustee in any legal proceeding to which he is made or becomes a party. The net proceeds resulting from the taking of all or any part of the property by eminent domain, or from any sale in lieu thereof, shall be applied upon the indebtedness in inverse order of its maturity; and in the event of the destruction of the improvements by fire or other casualty, the net proceeds of the insurance shall be applied upon the indebtedness secured hereby in inverse order of its maturity, or at the option of the party of the first part, his heirs and assigns, such proceeds may be used to restore the improvements to their former condition.

The owner of any part of the indebtedness aforesaid may, at his discretion, advance and pay such sums as may be proper to satisfy taxes, maintain insurance and repairs, and protect and preserve the property; and such amounts so paid shall be held and treated as part of the expense of administering this trust, shall be repaid on demand with interest at the highest rate legally chargeable on the date of the advance, and shall be secured by the lien of this Deed of Trust.

If the said party of the first part shall pay said indebtedness when due, and shall pay such sums as shall be necessary to discharge taxes and maintain insurance and repairs and the costs, fees and expenses of making, enforcing and executing this trust, when they shall severally be due and payable, then conveyance shall become void, and the owner of the indebtedness shall execute proper deed of release or enter marginal satisfaction on the record of this deed of trust, or in the alternative, the Trustee shall reconvey by quit claim the property herein described, all at expense of said party of the first part.

But if said party of the first part shall fail to pay any part of said indebtedness, whether principal or interest, promptly when the same becomes due, or shall fail to pay any sum necessary to satisfy and discharge taxes and assessments before they become delinquent, or to maintain insurance or repairs, or necessary expense of protecting the property and executing this trust, then, or in either event, all of the indebtedness herein secured shall, at the option of the owner of any of said indebtedness and without notice, become immediately due and payable, principal and interest, and the said Trustee is hereby authorized and empowered to enter and take possession of said property, and before or after such entry to advertise the sale of said property for twenty one days by three weekly notices in some newspaper published in Memphis, Tennessee, if the land described in this Deed of Trust is situated in Shelby County, Tennessee, or in some newspaper published in the County or Counties in which the land described in this Deed of Trust is situated, if other than Shelby County, Tennessee and sell the said property for cash to the highest bidder, free from equity of redemption, statutory right of redemption, homestead, dower, and all other rights and exemptions of every kind, all of which are hereby expressly waived, and said Trustee shall execute a conveyance to the purchaser in fee simple, and deliver possession to the purchaser, which the party of the first part binds himself shall be given without obstruction, hindrance or delay.

The owners of any part of the indebtedness hereby secured may become the purchaser at any sale under this conveyance.

If the notes secured hereby are placed in the hands of an attorney for collection, by suit or otherwise, or to enforce their collection by foreclosure or to protect the security for their payment, the party of the first part will pay all costs of collection and litigation, together with an attorney's fee as provided in said notes, or, if none is so provided, a reasonable attorney's fee, and the same shall be a lien on the premises herein conveyed and enforced by a sale of the property as herein provided.

The proceeds of any sale shall be applied as follows: first to the payment of the expenses of making, maintaining and executing this trust, the protection of the property, including the expense of any litigation and attorney's fees, and the usual commissions to the Trustee; second, to the payment of the indebtedness herein secured or intented so to be, without preference or priority of any part over any other part, and any balance of said indebtedness remaining unpaid shall be the subject of immediate suit; and third, should there be any surplus, the Trustee will pay it to the party of the first part, or his assigns. In the event of the death, refusal, or of inability for any cause, on the part of the Trustee named herein, or of any successor trustee, to act hereunder, or for any other reason satisfactory to the owner of the said indebtedness, the owner or owners of the majority of the outstanding indebtedness aforesaid are authorized either in their own name or through an attorney or attorneys in fact appointed for that purpose by written instrument duly registered, to name and appoint a successor or successors to execute this trust, such appointment to be evidenced by writing, duly acknowledged; and when such writing shall have been registered, the substituted trustee named therein shall thereupon be vested with all the right and title, and clothed with all the power of the Trustee named herein and such like power of substitution shall continue so long as any part of the indebtedness secured hereby remains unpaid. The party of the first part, for himself, his heirs, representatives, successors and assigns, covenants and agrees that at any time after default in payment of any of the indebtedness hereby secured, or upon failure to perform any of the covenants to be kept and performed by him, said Trustee may enter upon and take possession of said property and collect the rents and profits therefrom with payment of such to the Trustee after default being full acquittance to the tenant, but the Trustee shall be required to account only for the net rents received by him; and from and after the conveyance of said property under this Deed of Trust, the party of the first part, and all persons under him, shall, at the option of the purchaser, be and become the tenants at will of the purchaser, at a reasonable monthly rental, commencing with the date of delivery of the Trustee's Deed.

In the event that more than one Trustee be named herein, any one of such Trustees shall be clothed with full power to act when action hereunder shall be required, and to execute any conveyance of said property. In the event that more than one Trustee be named herein and the substitution of a trustee shall become necessary for any reason, the substitution of one trustee in the place of those or any of those named herein shall be sufficient. The term "Trustee" shall be construed to mean "Trustees" whenever the sense requires. The necessity of the Trustee herein named, or any successor in trust, making oath or giving bond, is expressly waived.

No waiver by the party of the second part or by the holder of the indebtedness secured hereby shall be construed as a waiver of a subsequent similar default or any other default by the party of the first part

The singular number may be construed as plural, and the plural as singular, and pronouns occurring herein shall be construed according to their proper gender and number, as the context of this instrument may require.

IN WITNESS WHEREOF, the party of the first part has executed, or has caused to be executed, this instrument on the day and year first above written.

Jimmy O. Climer

Suzette J. Climer

STATE OF TENNESSEE, COUNTY OF SHELBY:

Before me, a Notary Public in and for said State and County, duly commissioned and qualified, personally appeared

Jimmy O. Climer and wife, Suzette J. Climer,

to me known to be the person(s) described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

WITNESS my hand and Notarial Seal at office this 3rd day of December 19 75

Notary Public

My commission expires February 18, 1976

STATE OF TENNESSEE, COUNTY OF SHELBY:

Before me, the undersigned Notary Public in the State and County aforesaid, personally appeared

with whom I am personally acquainted and who, upon oath, acknowledged himself to be the President of the within named bargainor, a corporation, and that he as such President, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the corporation by himself as such President.

WITNESS my hand and Official Seal at office this day of 19

Notary Public

My commission expires

DEED OF TRUST

RECORDING DATA ONLY

MET

Mail Tax Bills to
(Person or Agency responsible for payment of taxes):

13773

State Tax $ 53.00

Register's Fee $ 0.50

Recording Fee $ 4.00

Total $ 57.50

STATE OF TENNESSEE
FAYETTE COUNTY

Filed for record DEC 8 - 1975

T. C. Geo Sheen Register

Return to:

COMPLIMENTS OF MID-SOUTH TITLE COMPANY, INC.

A Title Policy is a Vital Policy

Revised Feb., 1974
First Mortgage
Form 41

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